STATE OF MICHIGAN

COURT OF APPEALS

STEVEN P. RAND and AMANDA B. RAND, Plaintiffs-Appellees, v JACKSON COUNTY ROAD COMMISSION, Defendant-Appellant.	UNPUBLISHED February 3, 2004 No. 242961 Jackson Circuit Court LC No. 99-097100-CH

Before: O'Connell, P.J., and Wilder and Murray, JJ.

PER CURIAM.

Defendant appeals by right from an opinion and order holding defendant liable for trespass-nuisance. We vacate and remand for analysis under the correct legal framework.

Plaintiffs own land that abuts Thorne Road in Jackson County. In 1999, defendant marked approximately fifty trees to be cut in order to pave the road and improve sight distance. After being contacted by plaintiffs, defendant entered into a written agreement to remove only fourteen trees. Defendant removed thirty trees, however, and damaged another. Plaintiffs brought suit on a trespass-nuisance theory and prevailed in a bench trial. In this appeal, defendant asserts that the trial court erroneously held defendant liable for removing trees that were undisputedly located within a thirty-three foot strip of land that it claims was impliedly dedicated to the state as a public highway. We agree. We review de novo whether the land became a public highway through operation of the legal principle known as "highway by user." *Cimock v Conklin*, 233 Mich App 79, 84; 592 NW2d 401 (1998). The highway-by-user statute, MCL 221.20, provides:

> [A]ll roads that shall have been used as such for 10 years or more, whether any record or other proof exists that they were ever established as highways or not, and all roads which have been or which may hereafter be laid out and not recorded, and which shall have been used 8 years or more, shall be deemed public highways, subject to be altered or discontinued according to the provisions of this act. All highways that are or that may become such by time and use, shall be 4 rods in width, and where they are situated on section or quarter section lines, such lines shall be the center of such roads, and the land belonging to such roads shall be 2 rods in width on each side of such lines.

The highway-by-user statute treats property subject to it as "impliedly dedicated to the state for public use." *Kentwood v Sommerdyke Estate*, 458 Mich 642, 652; 581 NW2d 670 (1998). "'Highway by user' is a term that is used to describe how the public may acquire title to a highway by a sort of prescription where no formal dedication has ever been made." *Kent Co Rd Comm v Hunting*, 170 Mich App 222, 230; 428 NW2d 353 (1988). "The elements of a highway by user have been expanded to require evidence of a defined line of travel with definite boundaries, used and worked upon by public authorities, traveled upon by the public for ten consecutive years without interruption, in an open, notorious and exclusive manner." *Id.* at 231. Once the state establishes that the land was dedicated, "the statute operates to raise a rebuttable presumption that the road is four rods, or sixty-six feet wide." *Id*.

> However, this presumption may be rebutted if the landowner offers any evidence, such as the existence of a structure within the four-rod statutory width, or any other evidence, that the owner retained control of an area within the statutory width. *Bain v Fry*, 352 Mich 299, 305; 89 NW2d 485 (1958); *Eager v State Highway Comm'r*, 376 Mich 148, 151-152; 154, 136 NW2d 16 (1965). Once the presumption is rebutted, the highway cannot be wider than the zone of actual use which meets the highway by user test outlined above. *Eager*, *supra*, pp 154-155. [*Id*.]

The property owner must present evidence rebutting the "existence and extent" of a public highway within the ten-year period of limitation provided in MCL 221.20. *Kentwood*, *supra* at 654. The statute "allows for the dedication of the entire four-rod width unless the evidence rebuts the presumption." *Id*. In *Kentwood*, our Supreme Court further explained that "once a dedication has occurred and there is no evidence that the presumption of dedication has been rebutted, the original property owners no longer own the land dedicated to the public," and in fact "retains no interest in the land . . . ." *Id*. at 664.

Under *Hunting* and *Kentwood*, defendant's actions did not amount to any form of trespass if Thorne Road has fit the description of a highway-by-user for the statutory ten-year period and the presumptive width applies. *Peterman v DNR*, 446 Mich 177, 207; 521 NW2d 499 (1994).

Unfortunately, plaintiffs did not present evidence disputing that Thorne Road had become impliedly dedicated to defendant through the highway-by-user statute because the trial court's initial rulings rendered the issue presumably moot. The trial court based its rulings on the misunderstanding that regardless of the statute's application, defendant held a mere easement, so plaintiffs still retained an ownership interest in the property and its trees. Because the trial court never adequately addressed the application of the statute or plaintiffs' ability to overcome the statutory presumptions, we have no legitimate ruling to review. The trial court's approach to the issue preempted both sides from presenting relevant evidence that would help us meaningfully apply the highway-by-user statute and its presumptions. Therefore, we vacate the trial court's judgment and remand with instructions to apply the legal analysis outlined above and specifically determine if defendant used the road for the statutory period and, if so, whether the impliedly dedicated portion encompassed the removed trees.

Vacated and remanded. We do not retain jurisdiction.

/s/ Peter D. O'Connell
/s/ Kurtis T. Wilder